CHANG CHAN THONG T/A EXPRESS ALUMINIUM WORKS & TRADING CO.

v.

KEMAJUAN SRI SEGARA SDN. BHD. (FORMERLY KNOWN AS PEMBINAAN SRI-SEGARA SDN. BHD.)

HIGH COURT MALAYA, KUALA LUMPUR
DATUK K.L REKHRAJ JC
[NO. D2-28-337-95]
16 FEBRUARY 1996

COMPANY LAW: *Winding-up - Statutory demand under s. 218(2) Companies Act 1965 - Whether requirements of s. 218(2) fulfilled - Whether company unable to pay its debts - Whether company neglected to comply with statutory demand - Whether amount claimed was bona fide disputed - Whether petition was abuse of process of Court.*

The petitioner presented a winding-up petition under s. 218(1)(e) of the Companies Act 1965 to the effect that the respondent company was unable to pay its debts based upon a statutory demand for a sum for RM32,269.55.

Two shareholders cum directors filed a notice of intention to appear at the hearing of the petition and to oppose it supported by an affidavit stating that the amount claimed by the petitioner "was *bona fide* disputed by the respondent all along even prior to the presentation of the petition" and that the respondent had written to the petitioner complaining of incomplete and defective works by the petitioner and requesting rectification thereof and that as a result of their non-completion or rectification, the respondents were appointing third parties to carry out the works.

Upon receipt of the statutory demand the respondents again immediately and without delay wrote to the petitioner's solicitor setting out their reasons why they were "unable to settle the account".

The hearing of the petition was twice postponed at the request of the petitioner's solicitor on the ground that since the affidavit in reply had not been filed their papers were not in order. On the second date the Court had in passing sounded to the petitioner's solicitor to reconsider his intention to proceed as such under the Companies Act as there appeared to be a serious dispute with regard to the debt.

On 14 February 1996 a further adjournment by consent of both parties was sought which the Court refused initially but which was subsequently granted since the respondent's solicitor could not be contacted.

At the hearing on 16 February 1996 the respondent's Counsel successfully objected to the admissibility of the petitioner's affidavit in reply (filed on 13 February 1996) to the respondent's affidavit in opposition (served on 29 December 1995) as being in breach of r. 30(2) of the Companies (Winding-Up) Rules 1972.

Held:

[1] Upon a successful preliminary objection raised on the petitioner's counter affidavit, it could be safely presumed that the allegations made in the respondent's affidavit in opposition were admitted by the petitioner.

[2] It could not be contended that "debt" includes unliquidated damages or a sum of money capable of being ascertained. Therefore it is only when a debt has been established and not satisfied on demand for a period of three weeks that the deeming fiction embodied in s. 218(2) of the Companies Act would be attracted and not otherwise; where the debt is disputed *bona fide* this section does not come into operation.

[3] The service of the statutory demand on the company does not by itself *ipso facto* give authority to the creditor to bring an action. The creditor must in addition thereto show that the debtor has neglected to comply with the said notice upon service; and only then may rely on that neglect as a basis to show that the company is unable to pay its debts.

[4] The respondent immediately upon receipt of the statutory notice seriously disputed the debt; and the creditor cannot come before the Court and say that the statutory demand has been neglected; for the debtor had a reasonable excuse for not paying or complying with the notice; then it cannot be said to have "neglected" to pay and is not deemed unable to pay its debts.

[5] The whole exercise adopted by the petitioner was either to pressurize and/or to embarrass the commercial credit of the respondent in the eyes of the world. This was clearly an act of scandalous abuse of the process of the Court.

[6] Such frivolous or vexatious petitions and advertisements are causing great damage to the credit of the individual companies in the eyes of the commercial world especially through an unidentified computer network which is made available to some institutions the moment a petition is filed, the serious consequence of which is found in s. 223 of the Companies Act.

[Petition struck off. Petitioner to pay the respondent company costs on a "solicitor and client basis"]

Cases referred to:
Tinsukia Vastra Bhandar v. Assam Tea Corp. Ltd. [1991] 72 Comp. das 178 ***(foll)***
Kudremukh Iron Ore Co. Ltd. v. Kooky Roadways P. Ltd. [1990] 69 Comp. Cas 178 (KAR) ***(refd)***
Webb v. Stenton [1883] 11 QB 578 ***(refd)***
People v. Angvello [1869] 37 Calif 521 ***(refd)***
Newfinds (India) v. Vorion Chemicals & Distilleries Ltd. [1976] 46 Com. Cas 87 (MAD) ***(foll)***
Re London & Paris Banking Corporation [1874] LR 19 EQ 444 ***(foll)***

Legislation referred to:
Companies Act, s. 218(1), (2)

Other sources referred to:
Law Dictionary, Mozley & Whitelay's 10th Edn.

For the petitioner - E.T Soon, M/s. Ong Ban Chai & Co.
For the respondent - Ng Aik Guan, M/s. Ching, Tan & Assoc.
For the official Receiver - Azman Aiyub

JUDGMENT

K. L. Rekhraj JC:

The petitioner presented a petition in the Kuala Lumpur High Court against the respondent on the 16 October 1995 under s. 218(1)(e) of the Companies Act to the effect that the company is unable to pay its debts in the sum of RM32,269.85 and which statutory demand was made under the hand of the petitioner's solicitors M/s. Ong Ban Chai & Co. vide their notice dated 14 September 1995.

Two of the shareholders cum director filed a Notice of Intention to appear at the hearing of the petition fixed for 10 January 1996 and to oppose the said petition and this Notice of Intention to oppose was supported by an affidavit of Mr. Khaw Ooi Hiang, the director of the respondent company (enclosure 7) who deposed "that the amount of RM32,269.85 claimed by the petitioner was *bona fide* disputed by the respondent all along even prior to the presentation of the petition; the respondent had written to the petitioner requesting the latter to rectify the incomplete and defective works which the latter had failed to do so; thus ultimately necessitating the former to appoint two other contractors, namely Besmetal Sdn. Bhd. to carry out the said incomplete and defective works at a contract price of RM45,000; and another Mr. Leong Kai Sing to execute the consequential rectification and repainting works at a contract price of RM18,000; resulting in a net loss of RM30,730.15 to the respondent; after deducting the amount of RM32,269.85 as claimed by the petitioner."

The respondent further exhibited various correspondences that were exchanged between the petitioner and the respondent; letters issued even before the issuance of the statutory notice from the respondent to the petitioner more particularly letters dated 9 June 1995, 23 June 1995; putting the petitioner on notice of his defective works; and of the petitioner's neglect or refusal to carry out such uncompleted defective works; and that in default of the respondent carrying out, the respondent shall engage a third party to carry out the said works. The respondents upon the receipt of the statutory notice from M/s. Ong Ban Chai & Co. immediately and without delay on 20 October 1995 wrote to the said solicitors:

> We regret to inform you that we are not able to settle the above mentioned account due to the following reasons:
>
> (i) your client had delayed our work tremendously during the construction stage which caused us to incur additional cost. We are now checking on the additional cost incurred and will send the bill to you once it is ready;
>
> (ii) your client did not construct or install the aluminium work according to the drawings and specification;
>
> We hope that the above will serve to explain why we are unable to settle the account.

Further correspondences were shown to have been exchanged between the said petitioner's solicitors, the petitioner and the respondent denying the debt until the works were rectified and giving notice to the petitioner to the effect that as a result of their non-completion or rectification, the respondents were appointing third party to carry out such uncompleted works.

On 10 January 1996 when the petition came up for hearing the petitioner's solicitors informed the Court that their papers were not in order and the matters was adjourned to 7 February 1996. On **7 February 1996** when the matter was called again in open Court the petitioning solicitor Mr. E.T Soon informed the Court that the papers were again not in order. **The Court at this hearing in passing sounded to the solicitor to reconsider his intention to proceed as such** under the Companies Act; as there appeared to be a serious dispute with regard to the debt; and notwithstanding thereto, the Counsel for the petitioner sought a third adjournment to enable him to file an affidavit in reply and which affidavit enclosure (15) was filed on the 13 February 1996. The matter was fixed for hearing on the 14 February 1996 when the petitioning solicitor informed the Court that both himself and the respondent's solicitors have agreed to a postponement of the hearing of the petition.

The Court refused their joint consent for postponement and had the matter stood down for 11.30 am to enable the petitioning solicitor to get in touch with the respondent's solicitor to be present and explain to the Court of their conduct in mutually agreeing to have the matter adjourned without the Court's consent.

The petitioning solicitor came to Court at 11.30 am and informed that he was unable to contact the respondent's solicitor and as a result the case was fixed for hearing this morning.

At the start of the hearing the respondent's Counsel extended his apologies to the Court for his absence on the previous day; and then proceeded to take a preliminary objection on the enclosure (13) which according to the Counsel could not be admitted under s. 30(2) of the Companies (Winding-up) Rules 1972 which Rule reads:

> Any affidavit in reply to an affidavit in opposition to a petition (including further affidavit in support of any of the alleged in the petition) shall be filed within three days of the date of service on the petitioner of the affidavit in opposition and a copy of the affidavit in reply shall be forthwith served on the opposing petitioner or his solicitors.

According to the respondent's solicitors, the affidavit in opposition was served on the petitioners on 29 December 1995 and the last date for a reply under s. 32(2) was 3 January 1996; whereas the affidavit is only filed and served on 13 February 1996 at 4 pm. Upon a successful preliminary objection being raised on the counter affidavit it can now be safely presumed that the allegations made in enclosure (7) in the affidavit of Mr. Khaw Ooi Hiang, are admitted by petitioner. In *Tinsukia Vastra Bhandar v. Assam Tea Corp. Ltd.* [1991] 72 Comp. das. 178 (Gauhati) on a petition for winding-up the respondent company having failed to pay its debt, it was held, that in the absence of a counter affidavit, it shall be presumed that the allegations made in the petition (*albeit* in the affidavit in opposition as in this case) were admitted.

For the purposes of invoking s. 218 of the Companies Act the petitioner must show:

(a) that there is a **debt due and payable;** that means it must be **due at the time of the demand;** and **due means** it must have been possible to enforce payment of the debt by legal proceedings at the time of service of the demand (*Re Elgar Heights Pty. Ltd.* [1985] VR 657).

(b) that the respondent is **unable to pay** its debts.

Debt has been defined in *Mozley & Whitelay's Law Dictionary* 10th Edn. - as a certain sum due from one person to another either (1) by record e.g by judgment, (2) under speciality or deed or (3) under simple contract by writing or oral.

In *Kudremukh Iron Ore Co. Ltd. v. Kooky Roadways P. Ltd.* [1990] 69 Comp. Cas 178 (KAR)/ *Webb v. Stenton* [1883] 11 QB 578 - the connotation of **debt** has been defined as "a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum* in *praesenti solvendum* in *futuro*. In *People v. Angvello* [1869] 37 Calif 521 it

was said "standing alone, the word 'debt' is applicable to a sum of money which has been promised at a future day as against a sum now due and payable. If one wishes to distinguish between the two, one can say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: solvendum in *praensenti* and solvendum in future".

In the case of *Newfinds (India) v. Vorion Chemicals & Distilleries Ltd.* [1976] 46 Comm. Cas 87 (MAD) - the statutory defination of "debt" was defined as a definite sum (which under our Malaysian Act shall not be less than RM500 at the time of the presentation of the petition). Therefore it cannot be contended to include unliquidated damages or a sum of money capable of being ascertained. Therefore it is only when a debt has been established and not satisfied on demand for a period of three weeks that the deeming fiction embodied in s. 218(2) of the Companies Act would be attracted and not otherwise; where the debt is disputed *bona fide* - then this section does not come into operation.

Unable to pay its debts - Under our Companies Act, a company is unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his land or under the hand of his agent thereto lawfully authorised requiring the company to pay the sum so due and the company has for three weeks thereafter **neglected to pay** the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, degree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

The service of the statutory demand on the company does not by itself *ipso facto* give authority to the creditor to bring an action. The creditor must in addition thereto show that the debtor **has neglected to comply with the said notice upon service;** and only then may rely on that neglect as a basis to show that the company is unable to pay its debts. In that the petitioner may then safely rely on the **non-compliance** with the statutory demand to show inability to pay its debts. In this instant case before this Court, the debtor respondent immediately upon the receipt of the statutory notice seriously disputed the debt; and the creditor cannot come before the Court and say that

the statutory demand has been neglected; for the debtor had a reasonable excuse for not paying or complying to the notice; then it cannot be said to have "neglected" to pay and is not deemed unable to pay its debts. (*Re London & Paris Banking Corporation* [1874] LR 19 EQ 444. This Court was satisfied that there was no neglect and there was no debt then due and payable at the material time.

The petitioners' solicitors upon being confronted with the objection on the affidavit in reply then informed the Court that he was now invoking s. 221(2) of the Companies Act in making an application to the Court to withdraw the said petition, to which the respondent's solicitors had no objection provided:

(i) costs were awarded to the respondent.

The Court: From the facts as are evident from the affidavits filed, there was a **serious dispute** on the liability to pay and it cannot in the circumstances of the case be then said that the respondent was indebted to the petitioner until such time the disputed debt was crystalised into a liquidated ascertained sum. That the whole exercise adopted by the petitioner was either to pressurize and or to embarrass the commercial credit of the respondent in the eyes of the world. He ought to have known and realised from the very incept or upon indications given by the Court on 10 January 1996 that where there was a *bona fide* disputed debt the approach to recovery was through a civil claim to prove the debt and recover by the normal execution proceedings and not by winding up petition. To me this was clearly an act of scandalous abuse of the process of Court as the petitioner have not only failed to prove that there was a debt but miserably failed to show. to the satisfaction of the Court that the company was **unable to pay** its debts; more for the fact they now having chosen to withdraw the petition; was sufficient evidence of a non-debt. In passing this judgment I must remind the petitioners and or their solicitors, that such frivolous or vexatious petitions and advertisements are causing great damage to the credit of the individual companies in the eyes of the commercial world especially through an unidentified computer network which is made available to some institutions the moment a petition is filed; the serious consequences of which is s. 223 of the Companies Act *viz*:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made **after** the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

That the solicitors for the petitioners being the front and acting for the petitioners should decide on the merits of their client's success before filing the petitions; and should not do so when there is a slightest doubt or disputed facts.

Keeping this at the back of my mind, I struck off the petition and, to save the continuous embarrassment to the respondent of the petition having been published ordered that the petitioner and or their solicitors do immediately proceed to file a proper advertisement in the Government Gazette, the Malay Mail and in the New Straits Times, giving sufficient notification to all at large of the fact that the petitioners have now withdrawn the petition against the respondent and have the respondent's records expunged from any other computer network at their own costs. As costs are in the discretion of the Court and would normally follow the event; but in this case the petition being frivolous made to put pressure on the solvent company to pay the disputed debt, was a high risk strategy adopted; and I accordingly ordered the petitioner to pay the company costs on an indemnity basis-in that 'solicitor and client basis' to be paid forthwith.

Order accordingly.

Reported by Jasmesh Kaur